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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

82-6060

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Twentieth day of April, one thousand nine hundred and eighty-two.

Present:

HONORABLE STERRY R. WATERMAN,
HONORABLE LEONARD P. MOORE,
HONORABLE THOMAS J. MESKILL,

Circuit Judges.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

In re Grand Jury Proceeding Involving

MATTHEW MADONNA,

Appellant.

This is an appeal from an order of civil contempt pursuant to 28 U.S.C. § 1826(a) entered by the United States

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District Court for the Southern District of New York, Edelstein, *J.*, on March 17, 1982. The order provides that appellant is to be confined until he is willing to testify before the grand jury or until the expiration of its term or until August 25, 1982, whichever occurs first. Madonna has been serving consecutive fifteen year sentences for violating the narcotics laws, the running of which sentences had been suspended during his term of incarceration for civil contempt.

This appeal was argued by counsel who claims that (1) the conduct of a grand jury investigation solely for intelligence gathering purposes and to make the witness into a government informant to aid that purpose is an abuse of the grand jury process, and (2) the grand jury was conducted as a contempt trap to increase the term of imprisonment the witness is already serving and, therefore, the witness' refusal to testify, even under a grant of immunity, was justified.

A recalcitrant witness has no standing to take exception to the jurisdiction of the grand jury over the particular subject matter that is under investigation. *In re Yaasmyn D. Fula*, slip op. 1323, 1329 (2d Cir. Feb. 17, 1982). "The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it." *Branzburg* v. *Hayes*, 408 U.S. 665, 701 (1972); *United States* v. *Calandra*, 414 U.S. 338, 342-44 (1974). The grand jury in this case was apparently convened to investigate the relationship among major drug figures, some of whom had been previously convicted. Madonna presents no basis for impeaching the use of the grand jury for this function.

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Madonna's claim that it was improper to call him as a witness is likewise without merit. *Matter of Archuleta*, 561 F.2d 1059, 1061 (2d Cir. 1977). Madonna was convicted of possession and distribution of heroin and conspiring with others to possess and distribute heroin. He was called before the grand jury and asked about major drug figures in the New York area. As the Supreme Court stated in *Blair* v. *United States*, 250 U.S. at 282, a witness before a grand jury is:

> bound not only to attend but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry.
>
> He is not entitled to urge objections of incompetency or irrelevancy, such as a party may raise for this is no concern of his.

Madonna attempts to justify his refusal to testify on the ground that he should never have been called as a witness. However, the government is not required to make a preliminary showing that a witness will provide vital information before he may be required to appear before a grand jury. *United States* v. *Doe*, 457 F.2d 895, 899 (2d Cir. 1972), *cert. denied*, 410 U.S. 941 (1973). Since the case law precludes a witness' challenge to need or relevancy prior to appearing before a grand jury, it necessarily follows that a recalcitrant witness cannot argue these same points after refusing to testify as "just cause" for his refusal.

Madonna's claim that the grand jury was conducted as a contempt trap to increase his term of imprisonment is likewise without merit. There is no basis for concluding that the government knew that Madonna would not testify.

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Further, Madonna does not indicate why after he had spent six years in jail, the government would go through this elaborate process merely to hold him in contempt and thereby stay his thirty-year sentence for eighteen months.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said district court be and it hereby is affirmed.

/s/ Sterry R. Waterman,
Sterry R. Waterman, U.S.C.J.

/s/ Leonard P. Moore
Leonard P. Moore, U.S.C.J.

/s/ Thomas J. Meskill
Thomas J. Meskill, U.S.C.J.

Appendix B

Statutes Involved

Immunity of Witnesses

§ 6001. Definitions

As used in this part—

(1) "agency of the United States" means any executive department as defined in section 101 of title 5, United States Code, a military department as defined in section 102 of title 5, United States Code, the Atomic Energy Commission, the China Trade Act registrar appointed under 53 Stat. 1432 (15 U.S.C. sec. 143), the Civil Aeronautics Board, the Commodity Futures Trading Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Maritime Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, the National Labor Relations Board, the National Transportation Safety Board, the Railroad Retirement Board, an arbitration board established under 48 Stat. 1193 (45 U.S.C. sec. 157), the Securities and Exchange Commission, the Subversive Activities Control Board, or a board established under 49 Stat. 31 (15 U.S.C. sec. 715d);

(2) "other information" includes any book, paper, document, record, recording, or other material;

(3) "proceeding before an agency of the United States" means any proceeding before such an agency with respect to which it is authorized to issue subpenas and to take testimony or receive other information from witnesses under oath; and

(4) "court of the United States" means any of the following courts: the Supreme Court of the United States, a United States court of appeals, a United States district court established under chapter 5, title 28, United States Code, a United States bankruptcy court established under chapter 6, title 28, United States Code, the District of Columbia Court of Appeals, the Superior Court of the District of Columbia, the District Court of Guam, the District Court of the Virgin Islands, the United States Court of Claims, the United States Court of Customs and Patent Appeals, the Tax Court of the United States, the Court of International Trade, and the Court of Military Appeals.

§ 6002. Immunity generally

Whenever a witness refuses, on the basis of privilege against self-incrimination, to testify or provide other information in a proceeding before an ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in

any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

§ 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

§ 1826. Recalcitrant witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States

refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.